(1)

88-142

Supreme Court, U.S.
FILED
JUL 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ESTATE OF CLOYD A. PAYNE,
By DAVID MARLIN PAYNE,
Personal Representative On
Behalf Of Said Estate And All
Others Similarly Situated,
Petitioners

vs.

GRANT COUNTY COURT, JOHN P. PORTER
As Judge Of Said Court;
GRANT COUNTY and LINLEY E. PEARSON
As Attorney General Of
The State of Indiana,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether charging a criminal defendant an administrative fee when posting bail is a denial of due process under circumstances where the court order establishing bail and persons collecting bail fail to advise the defendant that he could post some larger amount and thus avoid payment of any fees.

2. Whether charging a criminal defendant an administrative fee when posting bail is prohibited by the United States Constitution as an unlawful taking of property without compensation.

THE PARTIES TO THE PROCEEDINGS

These are shown in the caption of the case.

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The State of Indiana,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT

The petitioners, the Estate of Cloyd A. Payne, by David Marlin Payne, Personal

Representative on behalf of said Estate and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinions of the Indiana Court of Appeals and the Supreme Court of Indiana entered in this proceeding on June 15, 1987 and April 19, 1988, respectively.

OPINION BELOW

The Indiana Court of Appeals entered an opinion in this cause on June 15, 1987 and the Supreme Court of Indiana entered an order denying the Petition to Transfer on April 19, 1988. The Indiana Court of Appeals Opinion may be found at Petitioners' Appendix at A-1 and is officially reported at 508 N.E.2d 1331. The unpublished order of the Supreme Court of Indiana denying transfer was entered on

April 19, 1988 and appears at Petitioners' Appendix at B-1.

JURISDICTION

The judgment denying transfer of the Supreme Court of Indiana was entered on April 19, 1988. The Supreme Court of Indiana is the highest court in that state having jurisdiction to review decisions of lower state courts. (Indiana Constitution, Article 7, §4; Indiana Rules of Appellate Procedure, A.P. 4(A) (7).) This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th Amendment to the Constitution of the United States:

> No person shall. . . be deprived of life, liberty, or property, without

> due process of law; nor shall private property be taken for public use, without just compensation.

The 8th Amendment to the Constitution of the United States:

> Excessive bail shall not be required. . . .

The 14th Amendment to the Constitution of the United States:

> . . .nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

Petitioners are a class of more than two thousand (2,000) people who paid in excess of Seventy Six Thousand Dollars ($76,000.00) as administrative fees in posting bail in criminal cases. In most instances the criminal defendant posted his own bail and in other cases a friend or relative would post the cash bail for the

defendant. The administrative fee, representing ten percent (10%) of the amount of cash posted, was charged pursuant to a court order. The court order did not specifically enumerate posting a full cash bond in some larger amount as an available option. Hence, the criminal defendants had an election to either pay a bail bondsman and post a surety bond, or post a cash bond and incur the administrative fee. The option of posting a full cash bond and avoiding any fees was never enumerated in the court order, nor was it ever offered as an option by the persons collecting the bond. The bail schedule did provide that the accused could "make personal application for a change of bail type or for a reduction in bail to the regular presiding Judge."

The Constitutional objections herein were raised and saved in the trial court

prior to the rendition of judgment, by the Motion to Correct Errors following judgment, and the petitioners' brief to the Indiana Court of Appeals and petitioners' brief to the Indiana Supreme Court.

The trial court denied the Motion to Correct Errors and entered judgment in favor of the respondents herein; petitioners appealed the judgment to the Indiana Court of Appeals where the trial court decision was affirmed by a written opinion which appears at Appendix A. Petitioners timely filed a Petition to Transfer to the Indiana Supreme Court which was denied without opinion (Appendix B).

REASONS FOR GRANTING THE WRIT

A STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case is similar to Schlib v. Kuebel (1971), 404 U.S. 357, 30 L. ed 2d 502, with one significant distinction -- the Grant County court order establishing a bail schedule and policy omitted any reference to a full cash bail. Hence, if a defendant elected to post bail he had the option of either paying a bondsman and posting a surety, or posting cash with the Court and forfeiting ten percent (10%) of the amount he posted as an administrative fee. The third option allowed the accused to "make personal application for a change of bail type or for a reduction in bail to the regular presiding Judge." The petitioners herein assert that if a bail schedule is established by the Court which provides a procedure for posting bail and the amount required if a surety bond is used and secondly provides an amount acceptable as cash bail with an

administrative fee, then in such instances, the Court has a further duty to establish a full cash bail and designate same as yet a third option. The failure to establish a full cash bail absent an administrative fee is a denial of due process under the United States Constitution.

Petitioners further contend that the 5th Amendment under the United States Constitution and Article 1 Section 21 of the Indiana Constitution prohibit taking property without just compensation. The trial court in this instance is requiring a defendant to pay an administrative fee as a condition for obtaining a lower bond. Hence, the trial court is selling the defendant a lower bond. The 8th Amendment to the United States Constitution prohibits excessive bail and the Indiana Constitution provides for an absolute and unqualified right to bail in all cases except murder or

treason. Indiana Constitution Article 1, Section 17. The Grant County Court's criminal jurisdiction is limited to infractions, misdemeanors and Class D felonies. Indiana Code 33-10.5-3-1. None of the petitioners herein were charged with murder or treason. Bail is recognized universally as a means of assuring the defendant appears when required. In Indiana, "bail bond" means a bond executed by a person who has been arrested to the commission of an offense, for the purpose of insuring his appearance at the appropriate legal proceeding. Indiana Code 35-33-8-1. Assuming arguendo that the petitioners in this case had a right, even though not enumerated, to post a full cash bail and thus avoid payment of the administrative fee, such arrangement is still in contradiction to the requirement that bond not be excessive. In monetary

terms, what guarantees the appearance of the accused is the number of dollars he lays on the table to post bail. Establishing some larger amount, and calling it a full cash bond, has no meaning -- such figures are illusory. If the defendant fails to appear, there is not so much as a debt created on the unpaid balance of a full cash bail. All the accused has lost in monetary terms is what he posted less the administrative fee. Opinion, Indiana Attorney General 81-1. If a Three Hundred Dollar ($300.00) bond is sufficient to insure the defendant's appearance at trial, it is clearly excessive to charge the defendant Three Thousand Dollars ($3,000.00) simply because he refuses to pay an administrative fee.

The only purpose of the administrative fee is to generate revenue for the courts (or counties). The United States

Constitution 5th Amendment, as it pertains to prohibiting the taking of property without compensation, was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Armstrong v. United States (1960) 364 U.S. 40, 4 L. Ed. 2d 1554; Webb's Fabulous Pharmacies, Inc. v. Beckwith, (1980) 449 U.S. 155, 66 L. Ed. 2d 358.

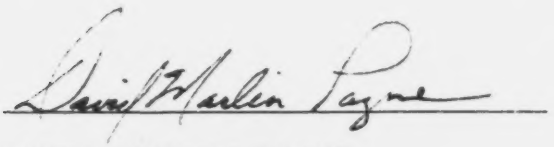
The only purpose of the fee from the standpoint of the accused is to purchase a lower bond from the Court and the only purpose of the fee from the standpoint of the Court is to generate revenue. If Three Hundred Dollars ($300.00) is adequate as a cash bond deposit provided the accused agrees to pay the fee, then it is also adequate as a cash bond. The higher amount, designated the full cash bond in

the sum of Three Thousand Dollars ($3,000.00), merely serves as punishment for not going along with the system.

CONCLUSION

For these reasons, petitioners urge that a writ of certiorari should issue to review the judgment and opinion of the Indiana Court of Appeals and the Indiana Supreme Court.

Respectfully submitted,



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APPENDIX

APPENDIX A

OPINION AND JUDGMENT OF THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

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IN THE COURT OF APPEALS OF INDIANA
SECOND DISTRICT

ESTATE OF CLOYD A. PAYNE By DAVID MARLIN PAYNE, Personal Representative On Behalf Of Said Estate And All Others Similarly Situated, Appellants (Plaintiffs Below)	)	
v.	)	No. 27A02-8609-CV-317
GRANT COUNTY COURT, JOHN P.PORTER, As Judgeof Said Court; GRANT COUNTY; and LINLEY E. PEARSON As Attorney General of The State of Indiana, Appellees (Defendants Below)	)	

APPEAL FROM THE GRANT CIRCUIT COURT,
THE HONORABLE DENNIS C. CARROLL,
SPECIAL JUDGE, BUCHANAN, JUDGE

CASE SUMMARY

This appeal arises from a class action brought by plaintiffs-appellants the Estate of Cloyd A. Payne, by David M. Payne, personal representative on behalf of the Estate and all others similarly situated [hereinafter collectively referred to as the Fee Payers], who now appeal the trial court's judgment in favor of defendants-appellees Grant County Court, John P. Porter as Judge of Grant County Court, Grant County, Linley E. Pearson as Attorney General of the State of Indiana [hereinafter collectively referred to as Porter] in the Fee Payer's suit to recover administrative fees retained by the Grant County Court when the Fee Payers posted cash bail bonds. The Fee Payers claim they were denied the opportunity to post full cash bail, and that the charging of an

administrative fee pursuant to Ind. Code 35-33-8-3(2) (1986) and the court's order is unconstitutional.

We affirm.

FACTS

In this opinion we refer to the procedure in which 10% of the amount of bail is posted by an accused in cash, and 1% of the total bail is retained by the court as an administrative fee upon conclusion of the case, as a cash bail bond. The posting of the entire amount of bail in cash is referred to as full cash bail.

On October 29, 1981, the Grant County Court established a bail schedule which described the amount of bail required for certain classes of offenses. For example, for a class A misdemeanor, the bail schedule provided that a surety bail bond

of $3,000 or a cash bail bond of $300 would be accepted by the court. The bail schedule further provided that the accused could "make personal application for a change of Bail type or for a reduction in Bail to the regular presiding Judge." Record at 50. A general order promulgated by the court on the same day which described the cash bail bond procedure provided that a person could satisfy bail by providing 10% of the amount specified in the general order as bail, and that the court would return 90% of the deposited sum at the conclusion of the action and would retain 10% of the amount deposited (or 1% of the entire bail amount) to cover administrative costs. If the accused posted the surety bond, no administrative fee was charged.

Cloyd A. Payne (Payne) was arrested for driving while intoxicated, and then

released after posting a cash bail bond of $300 (bond set at $3,000). Payne and his surety signed an acknowledgment as to their liability for the $300, and authorized the court to retain the lesser of 10% of that amount or $50 as an administrative fee. No reason is indicated as to why a surety also signed the acknowledgment. Subsequently, Payne pled guilty to reckless driving. The amount of the cash bail bond was returned to Payne, minus a $30 administrative fee retained by the court.

This Court previously decided that Payne was entitled by IC 34-1-66-1 (1982) to post full cash bail. Estate of Payne v. Grant County Court (filed November 5, 1984), Ind. App. No. 2-384-A-85, trans. denied. We reversed a finding of summary judgment in favor of Porter, so that the trial court could determine whether Payne was afforded an opportunity to post full

cash bail. Id. After remand, the trial court certified this suit as a class action.

On February 24, 1986, the cause was submitted to the trial court on stipulated facts. The relevant, summarized, stipulated facts reveal that the parties agreed that the Fee Payers were not orally advised by the trial court of their right to post full cash bail, but were informed that the administrative fee would be charged in the case of a cash bail bond regardless of the ultimate finding as to their guilt or innocence. Significantly, the parties stipulated that none of the Fee Payers ever requested to post full cash bail. It was also agreed that the amount of time and expense involved in processing cash bail bonds was the same regardless of the amount of the bond.

The trial court entered a memorandum decision on July 30, 1986, finding that the Fee Payers were not denied the right to post full cash bail. The Fee Payers now appeal.

The Fee Payers have adequately raised one general issue, which we restate as two:

1. Were the Fee Payers denied the right to post full cash bail?
2. Did the assessment of the 10% administrative fee violate the Fee Payer's constitutional rights?

The Fee Payer's argument that the administrative fee practice contravenes the purpose of the bail statute (IC 35-33-8-3) is waived. It is merely a statement of disagreement with that statute and contains no cogent argument or citation of authority, contrary to Ind. Rules of Procedure, Appellate Rule 8.3(A) (7). Conclusory, bald assertions of error are not enough.

Douglas v. State (1986), Ind., 490 N.E.2d 270; Hensley v. State (1986), Ind., 489 N.E.2d 62; Captain & Co. v. Stenberg (1987), Ind.App., 505 N.E.2d 88.

DECISION

ISSUE ONE - Were the Fee Payers denied the right to post full cash bail?

PARTIES' CONTENTIONS - The Fee Payers assert that they were denied their right to post full cash bail due to the Grant County Court's practice in following the general order and bail schedule and its failure to orally inform them of their right.

Porter responds that the Fee Payers failed to request the option to post full cash bail, and that there was no evidence that the opportunity to do so was denied.

CONCLUSION - The Fee Payers were not denied the right to post full cash bail.

When stipulated facts are presented to the court for resolution, no presumption in favor of the trial court exists on appeal inasmuch as this court is in as good a position as the trial court to apply the facts to the determination. Citizens Gas & Coke Util. v. American Economy Ins. Co. (1985), Ind., 486 N.E.2d 998.

Porter had the authority to promulgate the general order and the bail schedule specifying various types of bail available because IC 35-33-8-3 places within the discretion of the trial judge the manner of executing bail. Mott v. State (1986), Ind.App., 490 N.E.2d 1125. The Grant County Court's bail schedule specified the amount required for posting a surety bail bond and a cash bail bond, without specifically mentioning full cash bail as an available alternative. The order provided, however, that "the Court will accept either

type of Bail.... The accused may in person or by counsel, make personal application for a change of Bail type or for a reduction in Bail to the regular presiding Judge." Record at 161 (emphasis added).

Although neither document specified that the accused could post full cash bail, the orders in no way denied the accused that opportunity. Somewhat ambiguously, the bail schedule merely suggested two viable alternatives to posting bail, but did not preclude any other statutorily recognized bail options. See IC 35-33-8-3; IC 34-1-66-1. However, the parties stipulated that, "[n]o member of the class of plaintiffs requested to post [full cash] BAIL[1]." Record at 159. There is simply no

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[1]The parties used the term "BAIL" in the stipulated facts to describe the full amount required to be paid in order to be released from custody, without the imposition of an administrative fee," i.e., full cash bail. Record at 158.

showing that the court denied the Fee Payers the right to post full cash bail.

ISSUE TWO - Did the assessment of the 10% administrative fee pursuant to the court's general order and IC 35-33-8-3(2)[2] violate the Fee Payer's constitutional rights?

PARTIES' CONTENTIONS - The Fee Payers challenge the constitutionality of the administrative fee assessed by the Grant County Court, claiming the assessment is a

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[2]IC 35-33-8-3 states:

"The court may admit the defendant to bail and impose any of the following conditions to assure the defendant's appearance at any stage of the legal proceedings:

....

(2) Require the defendant to execute a bail bond by depositing cash or securities with the county clerk in an amount not less than ten percent (10%) of the bail. A portion of this deposit, not to exceed ten percent (10%) of the monetary value of the deposit or fifty dollars ($50), whichever is the lesser amount, may be retained as an administrative fee...."

denial of due process, an unlawful taking without just compensation, without rational basis, a denial of their right to bail, and a contravention of their right to liberty.

Porter denies any violation of the Fee Payer's constitutional rights.

CONCLUSION - The assessment of the administrative fee pursuant to Grant County Court's general order and IC 35-33-8-3(2) is not unconstitutional.

Every statute is presumed constitutional, thus, the Fee Payers must provide sufficient evidence to clearly overcome the presumption. See American Nat'l Bank v. Indiana Dep't of Highways (1982), Ind., 439 N.E.2d 1129; State v. Monticello Developers, Inc. (1987), Ind.App., 502 N.E.2d 927.

The court can properly charge an administrative fee when an accused posts cash bail bond. The United States Supreme

Court in Schlib v. Kuebel (1971), 404 U.S. 357, firmly established that a 1% administrative fee such as that charged in the present case is not a cost of prosecution,[3] but rather an administrative cost imposed on all accused who take advantage of the benefits of a cash bail bond provision instead of using the services of a bail bondsman. On the basis that the 1% fee is an administrative fee which all accused must satisfy, we reject the Fee Payer's due process argument that the fee was unconstitutional because imposed without regard to the guilt or the innocence of an accused. This court followed this precedent in Board of County Comm'rs v. Farris (1976), 168

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[3]The Fee Payers cite Giaccio v. Pennsylvania (1966), 382 U.S. 399, to support their due process argument. However, the Court in Schlib readily distinguished Giaccio as a case involving costs of prosecution, and the vagueness and absence of standards in an "ancient Pennsylvania statute." Schlib, supra, 404 U.S. at 370.

Ind. App. 309, 342 N.E.2d 642, trans. denied.

Closely connected to this discussion is the Fee Payers's assertion of a violation of their right to just compensation for an unlawful taking of property. As we have indicated, the amount retained by the court was ad administrative fee paid by the accused to the county clerk to cover the costs of handling bail bonds and related paper work, there is no unlawful taking of the property of the Fee Payers to which they are entitled to compensation. Rather, the Fee Payers voluntarily parted with 10% of the amount they deposited in exchange for the benefits received from not having to deal with a bail bondsman and thereby forfeiting, in all likelihood, the full 10% of the bail amount, Cf. State v. Bailey (1980), Ind.App., 405 N.E.2d 38 (order requiring

estate to refund inheritance tax was not an unconstitutional taking of property by the State when estate voluntarily chose to pay the tax instead of offering security to cover the tax while the validity of the tax was litigated).

Thus, having determined that it is not unconstitutional to have the administrative fee included in the court's order and in IC 35-33-8-3, we next turn to the Fee Payers's argument as to the manner in which the fee is charged.

The Fee Payers, in what appears to be a two-tiered argument, allege the fee is without rational basis because the amount of the fee varies based on the type of the offense and correlating amount of bail imposed by the schedule, and because an accused posting full cash bail is not required to pay the administrative fee.

The decision by our legislature to impose a 10% fee as opposed to a fixed amount when an accused chooses to post a cash bail bond is not without a rational basis. The Fee Payers would have the amount of the fee, if any, fixed regardless of the charged offense, instead of imposed in terms of percentage. The legislature provided that 10% of the deposited amount or $50, whichever is lesser, may be retained by the county clerk. IC 235-33-8-2(2). In essence, there is a fixed amount, as a ceiling is set at $50, with those accused of lesser offenses receiving the benefit of a lesser administrative fee. Furthermore, the use of a percentage, as opposed to a flat amount, may be explained by recognizing that more responsibility is incurred when a higher bail is set. In response to a similar argument alleging no

rational basis made in the Schlib controversy, the Illinois Supreme Court answered:

> Historically many fees and charges for the services of court officers have been fixed in proportion to the amount involved.... [Percentage] rates are also found in the field of taxation, as defendants suggest, including income taxes, retailers' occupation taxes, real-estate taxes, use taxes, and inheritance and transfer taxes.

Schlib v. Kuebel (1970), 46 Ill.2d 538, 550-51, 264 N.E.2d 377, 383, aff'd 404 U.S. 357. Thus, the use of a percentage method to determine the fee has considerable precedent.

In the second tier of the Fee Payers's rational basis argument, we are again persuaded by the language of the United States Supreme Court in Schlib:

> [O]ne who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of the deposit; presumably, at least, its interim possession by the State accrues to the benefit

> of the State. Further, the State's protection against the expenses that inevitably are incurred when bail is jumped is greater when 100% cash... is deposited or obligated than when only 10% of the bail amount is advanced.

Schlib, supra, 404 U.S. at 367. Thus, the method of imposing a percentage fee in the case of a cash bail bond is not without rational basis.

Finally, the Fee Payers's somewhat nebulous arguments, that they were denied the right to bail, and that their right to liberty was contravened are likewise futile. A scrutiny of the record and the stipulated facts indicate that the Fee Payers were allowed to post bail, to request a change in bail type, and that they did indeed post bail. We can fathom no deprivation, actual or threatened, of the liberty of the Fee Payers because they paid an administrative fee as part of the cost of a cash bail bond. Cf. State ex.

rel. Williams v. Ryan (1986), Ind., 490 N.E.2d 1113 (Indiana Supreme Court specifically upheld the placing of various conditions on the posting of cash bail bond, discerning no constitutional violation of the right to bail).

In summary, the Fee Payers do not demonstrate that they were denied the right to post full cash bail, and failed to overcome the presumption that the general order or bail schedule which followed IC 35-33-8-3(2), denied them any constitutional rights.

Affirmed. DATED: June 15, 1987

SHIELDS, P.J. CONCURS.

GARRARD, P.J. CONCURS.

APPENDIX B

ORDER OF THE SUPREME COURT OF
INDIANA DENYING PETITION TO TRANSFER

IN THE
SUPREME COURT INDIANA

ESTATE OF CLOYD A. PAYNE By DAVID MARLIN PAYNE, Personal Representative On Behalf Of Said Estate And All Others Similarly Situated, Appellants (Plaintiffs Below)	)	
v.	)	No. 27A02-8609-CV-317
GRANT COUNTY COURT, JOHN P.PORTER, As Judge of Said Court; GRANT COUNTY; and LINLEY E. PEARSON As Attorney General of The State of Indiana, Appellees (Defendants Below)	)	

Appllants' Petition for Transfer is hereby denied.

4/19/88
Date

CHIEF JUSTICE SHEPHERD
All Justices Concur